

Rai (Migration) [2018] AATA 4906 (26 October 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr Sumeet Rai

VISA APPLICANT: Mrs Sunita Chamling Rai

CASE NUMBER: 1801302

DIBP REFERENCE(S): BCC2016/1630399

MEMBER: Mark O'Loughlin

DATE: 26 October 2018

PLACE OF DECISION: Adelaide

DECISION: The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- Public Interest Criterion 4020 for the purposes of cl309.225 of Schedule 2 to the Regulations.
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Statement made on 26 October 2018 at 12:34pm

CATCHWORDS

MIGRATION – Partner (Provisional)(Class UF) – Subclass 309 (Partner)(Provisional) visa – bogus documentation – birth certificate – unintended translation error – new translated certificate consistent on main issues – steps taken to obtain another original copy – compassionate and compelling circumstances – Australian citizen child – decision under review remitted for reconsideration

LEGISLATION

Marriage Act 1961 (Cth) s 65

Migration Regulations 1994 (Cth) Schedule 2 cls 309.225, 309.228 Schedule 4 PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi and Others v Minister for Immigration and Border Protection and Another (2014) 220 FCR

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 3 January 2018 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 4 May 2016 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.228 because the applicant did not satisfy PIC 4020 due to the provision by her of a bogus document.
4. The Tribunal notes that relevant provision was in fact cl 309.225 but in either case the applicant is required to satisfy PIC 4020 and so the practical effect of the finding that the applicant did not satisfy that provision is the same under cl 309.225 and 309.228.
5. The visa applicant and the review applicant appeared before the Tribunal on 12 September 2018 to give evidence and present arguments.
6. The review applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
7. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.309.225 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and

- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
9. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

10. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
11. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
12. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
13. The document that attracted the attention of the delegate of the Minister was the applicant's birth certificate and a translation thereof.
14. At the time of application for the subject visa, a document purporting to be the original birth certificate, in Nepali, was provided to the department.
15. A translation dated either 12 Nov 2008 or 30 June 2009 (it is not clear from the face of the translation and the matter is not important) suggests that the birth certificate was issued by the Hansposa Village Development Committee in the Sunsari District. The translation also states that the applicant was born on the 24th of March 1990 at Hansposa – 02.
16. The applicant says that she lived in Hansposa but was born in Khotang. Khotang is the birthplace given on the British passport that she obtained in April 2016 and on her certificate of naturalisation as a British citizen dated 3rd March 2016.
17. It is not controversial that in Nepal the applicant's birth certificate would be issued by the district in which she lived in Nepal rather than the district in which she was born. This is apparently because her records are consolidated and held by the district in which she lives.
18. A delegate of the Minister, in assessing this visa application, arranged for confirmation of the translation of the applicant's birth certificate.

19. The translation could not be confirmed because the place of birth was wrong.
20. The sponsor advised the delegate that he could read both English and Nepali and on careful consideration he could see that there was a mistake in the original translation. He expressed surprise that the mistake had not been detected earlier and arranged for a new translation.
21. That translation dated 29 March 2017 gave the visa applicant's place of birth as Khotang, Khidima -03.
22. The new translation appears to be consistent with the older translation in all other important particulars.
23. The delegate of the Minister was not satisfied that the new translation provided satisfactory evidence of the visa applicant's place of birth. It was determined that a new copy of the original document should be obtained and that that could be translated to put the matter at rest.
24. An effort was made to obtain a fresh copy of the applicant's birth certificate from the Hansposa Village Development Committee under Sunsari district.
25. The Tribunal notes that Nepal is divided into a number of provinces which are subdivided into districts which are themselves divided and sub-divided into sub-metropolitan cities, village councils, and wards in addition to other types of divisions.
26. The Tribunal observes that the translations of the original birth certificate say that the certificate was issued by the Hansposa Village Development Committee of the Sunsari District which is a district of Province 1.
27. In 2017 when approached for a copy of the original birth certificate, the relevant office advised that the document did not exist.
28. On that basis the delegate of the Minister determined that the birth certificate that had been provided to the department by the applicant was counterfeit or had been altered without authority.
29. The decision of the delegate was made on 3 January 2018.
30. In August of 2018, about 7 months later, the applicant's representative lodged submissions with the Tribunal in support of the subject application for review and provided supporting documents.
31. Among those documents was an apparently genuine translation of a letter dated 21 January 2018 from the Itahari Sub-Metropolitan City, No. 20 Ward Office, Itahari, Sunsari (District), Province No 1, Nepal.
32. That letter says that the applicant was born in ward No. 3 of Khidima VDC of Khotang District. Research suggests that Khotang is a district of Province No. 1.
33. That letter further states that the former Hasposa VDC was abolished and merged with Itahari Sub Metropolitan City in 2014 and ward no. 2 became Itahari ward no. 20. The letter also states that all the records stored in the VDC were "torn".
34. No reason is given for the destruction of the records (if that is what is meant by "torn") or how the current Ward Chairman can certify the applicant's birth details without those

records, but this does provide an explanation for the inability of the delegate of the Minister or the investigators to find the original birth certificate in 2017. The Tribunal accepts the contents of the translated letter of 21 January 2018.

35. On the basis of this fresh evidence the Tribunal finds that the original translation of the applicant's birth certificate contained a mistake to the extent that it stated that the applicant was born in Hasposa and that the later translation that says that the applicant was born in Khotang is accurate.

36. The definition of **bogus document** is found in S 5 of the Act;

37. "**bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly."

38.

39. The Tribunal finds that there is nothing to support a reasonable suspicion of the type referred to in parts (a),(b) and (c) of the definition in respect of the original translation of the birth certificate. The Tribunal further finds that there is nothing to support a reasonable suspicion that the original birth certificate was a "bogus document" as defined. The Tribunal therefore finds that the applicant has not given or caused to be given a "bogus document" as defined and does not therefore fail to meet PIC 4020 for that reason.

40. The Tribunal further finds that the mistake in the original translation of the birth certificate was an innocent or unintended mistake on the part of the translator.

41. That being the case, the information contained in the translation of the birth certificate is not "false" for the purposes of PIC 4020¹

42. The authorities do not appear to deal with the question of whether information can be relevantly "misleading" without there being an element of fraud or intention to deceive by some person although there does appear to be some support for the general proposition that PIC 4020 will not be engaged without an element of fraud or deception by someone be it the applicant or someone else².

43. The Tribunal finds that there is no such element of fraud or deception in this matter, merely a mistake by the provider of the original translation. There is no apparent benefit to the interpreter or any other person in promoting Hasposa rather than Khotang as the applicant's birthplace.

44. If that is wrong and the information is capable of being misleading without an element of fraud or deception on the part of any person, the Tribunal would be obliged to consider

¹*Trivedi and Others v Minister for Immigration and Border Protection and Another* (2014) 220 FCR at [32]

²*Trivedi and Others v Minister for Immigration and Border Protection and Another* (2014) 220 FCR at [33]

whether it can and should invoke PIC 4020 (4) (b) which grants the power to waive the requirements of (relevantly) PIC 4020 (1) (a).

45. The Tribunal has been provided with a certified copy of a birth certificate dated 27th July that shows that the applicant gave birth to a son on 23 July 2018.
46. The applicant has submitted, and the Tribunal accepts, that the child is an Australian citizen by birth.
47. The applicant submits that his birth and his need for his mother's care qualify as "compassionate" or "compelling" circumstances that affect the interests of an Australian citizen and thus justify the granting of the visa. The Tribunal accepts that submission and finds that the circumstances are compassionate and compelling.
48. Therefore, even if the provision of the original translation of the birth certificate with the mistake in it is relevantly the provision of "misleading information" and offends PIC 4020 (1) (a) the Tribunal finds that there are compassionate and compelling circumstances to justify waiving paragraph (1)(a) of PIC 4020.
49. Therefore, the applicant **meets** PIC 4020(1) but the Tribunal would waive PIC 4020(1) if that were not the case.

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

50. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).
51. The Tribunal is satisfied by the oral evidence of the parties and the documents before it that there is no evidence that aside from this application the applicant or any member of her family has been refused a visa in the relevant period because of a failure to satisfy PIC 4020 (1).
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52. Therefore, PIC 4020(2) **is met**.

Has the applicant satisfied the identity requirements?

53. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. The applicant has provided ample evidence of her identity including a British passport and a certificate of British citizenship.
54. Therefore, the applicant **meets** PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

55. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).

56. The Tribunal is satisfied on the basis of the oral evidence of the parties and the evidence of the documents before it that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the relevant identity requirements in PIC 4020 (2A)
57. Therefore PIC 4020(2B) **is met**.
58. On the basis of the above, the applicant **does** satisfy PIC 4020 for the purposes of cl.309.225.
59. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

60. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

Mark O'Loughlin
Member

**PUBLIC INTEREST CRITERION 4020 FOR THE PURPOSES OF CL309.225 OF
SCHEDULE 2 TO THE REGULATIONS.ATTACHMENT**

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; justify the granting of the visa.
- (5) In this clause:
- information that is **false or misleading in a material particular** means information that is:
- (a) false or misleading at the time it is given; and

- (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...